84-1178

Office-Supreme Court, U.S.
FILED
JAN 18 1985
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

STATE OF FLORIDA,

Petitioner,

-vs-

THOMAS RAPHAEL FASENMYER,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

LAWRENCE A. KADEN
Assistant Attorney General
The Capitol
Tallahassee, Florida 32301
(904) 488-0600

COUNSEL OF RECORD

25

QUESTION PRESENTED

WHEN AN APPELLATE COURT REDUCES THE SEVERITY OF A CRIMINAL CONVICTION, DOES THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION PRECLUDE THE TRIAL COURT FROM ALTERING ON REMAND, IN ORDER TO ACHIEVE MORE CLOSELY HIS ORIGINAL SENTENCING PLAN, OTHER JUDGMENTS AND SENTENCES WHICH WERE NOT AFFECTED BY THE APPELLATE COURT JUDGMENT?

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS WHY THE WRIT SHOULD BE GRANTED	15
CONCLUSION	25

TABLE OF CITATIONS

CASES	PAGE
Busic v. United States, 449 U.S. 398	15, 18 25
Ex Parte Lange, 18 Wall. 163, 21 L.Ed. 872 (1874)	23, 24
Fasenmyer v. State, 305 So.2d 99 (Fla. 1st DCA 1974), cert. denied, 315 So.2d 188 (Fla. 1975)	1
Fasenmyer v. State, 383 So.2d 706 (Fla. 1st DCA), cert. denied, 389 So.2d 1109 (Fla. 1980)	1
Fasenmyer v. State, 413 So.2d 33 (Fla. 1st DCA 1981), cert. denied, 413 So.2d 877 (Fla. 1982)	1
Fasenmyer v. State, 425 So.2d 151 (Fla. 1st DCA 1983)	1, 16
Fasenmyer v. State, 457 So.2d 1361 (Fla. 1984)	1, 4, 20, 24
McClain v. United States, 676 F.2d 915 (2d Cir.), cert. denied, ___ U.S. ___, 103 S.Ct. 174 (1982)	21

TABLE OF CITATIONS (contd.)

CASES	PAGE
North Carolina v. Pearce, 395 U.S. 711 (1969)	19, 24
Troupe v. Rowe, 283 So.2d 857 (Fla. 1973)	23, 24
United States v. Benz, 282 U.S. 304 (1931)	23, 24
United States v. Busic, 639 F.2d 940 (3d Cir.), cert. denied, 452 U.S. 918 (1981)	18, 20, 24
United States v. Covelli, 738 F.2d 847 (7th Cir. 1984)	22
United States v. DiFrancesco, 449 U.S. 117 (1980)	19, 23, 24, 25
United States v. Hagler, 709 F.2d 578 (9th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 282 (1983)	21
United States v. Jefferson, 714 F.2d 689 (7th Cir. 1983)	21
United States v. Moore, 710 F.2d 270 (6th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 497 (1983)	20

TABLE OF CITATIONS (contd.)

OTHER	PAGE
28 U.S.C. §1257(3)	2

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at Fasenmyer v. State, 457 So.2d 1361 (Fla. 1984). The opinion of Florida's First District Court of Appeal, which was reversed by the Supreme Court of Florida, is reported at Fasenmyer v. State, 425 So.2d 151 (Fla. 1st DCA 1983). Other relevant state court opinions involving the same Respondent can be found at Fasenmyer v. State, 305 So.2d 99 (Fla. 1st DCA 1974), cert. denied, 315 So.2d 188 (Fla. 1975); Fasenmyer v. State, 383 So.2d 706 (Fla. 1st DCA), cert. denied, 389 So.2d 1109 (Fla. 1980); and Fasenmyer v. State, 413 So.2d 33 (Fla. 1st DCA 1981), cert. denied, 413 So.2d 877 (Fla. 1982).

JURISDICTION

The opinion of the Supreme Court of Florida was rendered on September 13, 1984, and rehearing was denied on November 21, 1984. The State's motion to stay mandate was granted until December 21, 1984. On December 7, 1984, Justice Powell denied Florida's motion to stay further the Florida Supreme Court's mandate.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, excepting cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment of the United States Constitution provides

in pertinent part:

> SECTION 1. All persons born, or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The following statement of the case is taken directly from the Florida Supreme Court's opinion at Fasenmyer v. State, 457 So.2d 1362-1364:

This cause is before the Court on petition for review of a decision of the District Court of Appeal, First District. The district court held that on remand after a successful appeal challenging only one of three criminal convictions, where the appellate relief clearly attached to only one of the three convictions, the trial court could resentence the offender not only on the offense affected by the appellate court's ruling but also on the other offenses, including an offense the previously imposed sentence for which had been completely satisfied at the time of resentencing. Fasenmyer v. State, 425 So.2d 151 (Fla. 1st DCA 1983). Finding the jurisdictional ground of express and direct conflict with Troupe v. Rowe, 283 So.2d 857 (Fla. 1973) and Herring v. State, 411 So.2d 966 (Fla. 3d DCA 1982), we accept the case for review.

Art. V, § 3(b)(3), Fla. Const. The issue is whether, when an appellate court reduces the severity of a criminal conviction because of lack of evidence and orders resentencing accordingly, the trial court may change the sentences previously imposed on other convictions not affected by the appellate court judgment. Under the facts of this case as set out below, we hold that it may not.

In 1973, petitioner was convicted of three crimes and was sentenced for them as follows: (1) count one, breaking and entering with intent to commit a felony, while armed with a dangerous weapon, one hundred years; (2) count two, grand larceny, five years, consecutive to the sentence on count one; (3) count three, use of a firearm during the commission of a felony, fifteen years, consecutive to the sentences on counts one and two. On appeal, the judgment was

affirmed without opinion. Fasenmyer v. State, 305 So.2d 99 (Fla. 1st DCA 1974), cert. denied, 315 So.2d 188 (Fla. 1975). However, petitioner sought habeas corpus relief in federal district court and received a new trial. He was again convicted on all three counts, but on appeal the convictions were reversed for a new trial due to procedural error by the trial court which was held to have been damaging to the fairness of the trial. Fasenmyer v. State, 383 So.2d 706 (Fla. 1st DCA), review denied, 389 So.2d 1109 (Fla. 1980).

Upon being tried a third time petitioner was again convicted of the same three offenses and was sentenced as follows: (1) on count one, breaking and entering while armed, fifty years with credit for seven years served; (2) on count

two, grand larceny, five years, to be served concurrently with the sentence on count one; (3) on count three, use of a firearm while committing a felony, no sentence was imposed, on the ground that the offense in count three "merged" with the offense in count one. Petitioner again appealed his convictions, and this time the appellate court held that there was insufficient evidence to convict him of breaking and entering. The court held that the highest offense petitioner could be convicted of on count one was entering without breaking. The court remanded for entry of judgment of conviction for that offense and for appropriate resentencing. The court specifically observed, "No error affects appellant's other convictions."

Fasenmyer v. State, 413 So.2d 33, 33 (Fla. 1st DCA 1981), review denied, 413 So.2d 877 (Fla. 1982).

On resentencing, the trial court was faced with an unusual situation. When imposing sentence previously the court had determined that count one, breaking and entering enhanced by the carrying of a firearm, and count three, based on the use or display of a firearm during the burglary, had "merged," and accordingly, had imposed no sentence on count three. After remand from the district court of appeal, ordering reduction of the offense in count one to entering without breaking, it was determined that counts one and three had "unmerged" because there was no statutory provision for enhancement of the crime of entering without breaking by

proof of the carrying of a firearm. If the sentence on count one was to be reduced to the statutory maximum punishment of five years and the sentence on count three (no sentence) was left undisturbed, then petitioner would escape punishment entirely for having used a firearm in the commission of the crime.

At the resentencing hearing, petitioner's counsel sought to alleviate this problem for the court by offering a stipulation or testimony that petitioner was carrying a loaded gun at the time of the unlawful entry he was convicted of on count one. Counsel's purpose was to allow the court to sentence petitioner for entering without breaking as a second-degree felony, carrying a possible penalty of fifteen years, rather than as a third-degree felony carrying a maximum penalty of five years. Use of

the applicable enhanced penalty provision required proof of possession of "nitroglycerine, dynamite, gunpowder, or other high explosive." See § 810.03, Fla. Stat. (1973) (referring to §810.01, Fla. Stat. (1973)). However, the court would not accept petitioner's argument that the powder in the bullets of his gun came within this statutory provision, and found that the most petitioner could be sentenced to on count one was five years.

Petitioner's objective in making this stipulation and argument was to avoid having the trial judge resentence him under count three. He argued that resentencing under count three would violate the rule of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Pearce held that although there is no

constitutional bar to imposing a more severe sentence on retrial after appeal, the Due Process Clause of the Fourteenth Amendment requires that vindictiveness against the defendant for having taken a successful appeal "must play no part in" resentencing. Valid reasons for a harsher sentence than that previously imposed must affirmatively appear in the record and be based on "objective information concerning identifiable conduct." Id. at 725-26, 89 S.Ct. at 2080-81.

The trial court resentenced appellant as follows: (1) for count one, entering without breaking with intent to commit a felony, five years; (2) for count two, grand larceny, five years, consecutive to count one; (3) for count three, use of a firearm in the commission

> of a felony, fifteen years, consecutive to counts one and two. Petitioner was given credit for nearly nine years of time served.
>
> On appeal petitioner challenged the resentencing on counts two and three. The district court affirmed and held that the trial court could change the sentences on offenses which were not challenged or disturbed on appeal as to either conviction or sentence. Relying on United States v. Busic, 639 F.2d 940 (3d Cir. 1981), the district court reasoned that such a rule would allow the sentencing court to achieve its original sentencing plan based on the aggregate of the convictions. Fasenmyer v. State, 425 So.2d 151, 152 (Fla. 1st DCA 1983). (Footnotes omitted)

Although the effect of the Florida Supreme Court's opinion is

to cause Respondent to be released from custody in the near future, this case will not become moot because if the Florida Supreme Court is reversed by this Court, Respondent's expiration of sentence will not be until February 24, 1986. In other words, a reversal by this Court would, in effect, cause Respondent to be reincarcerated until his sentence expires on February 24, 1986.

REASONS WHY THE WRIT SHOULD BE GRANTED

CERTIORARI SHOULD BE GRANTED BECAUSE THE FLORIDA SUPREME COURT DECIDED THE SUBSTANTIAL FEDERAL QUESTION WHICH HAD BEEN LEFT UNANSWERED IN BUSIC V. UNITED STATES, 449 U.S. 398, 412, n. 19, IN A MANNER IN CONFLICT WITH SEVERAL OF THE FEDERAL COURTS OF APPEALS.

Respondent was tried three times in the state courts of Florida. Each time he was resentenced, his total exposure to the correctional system was lessened--from 120 years to 50 years to 25 years. At the conclusion of Respondent's third trial, Respondent appealed to Florida's First District Court of Appeal which vacated one of the judgments and sentences and remanded for resentencing. In order to

achieve his original sentencing goal of a lengthy period of incarceration (120 years), the trial court imposed new sentences for the two judgments which had not been disturbed on appeal. Specifically, the trial court imposed a five year sentence for the offense of entering without breaking, a five year sentence (consecutive) for the offense of grand larceny, and a fifteen year sentence (consecutive) for the offense of use of a firearm during the commission of a felony. Thus, Respondent was given a total exposure of 25 years in the state prison.

Although the intermediate appellate court affirmed these new judgments and sentences, Fasenmyer v. State, 425 So.2d 151 (Fla. 1st DCA 1983), the Florida Supreme Court reversed and

specifically found that the trial court had violated the double jeopardy clause of the United States Constitution[1] by imposing a consecutive five year sentence on a count which had already been served and a 15 year consecutive sentence on a count which had not been challenged on appeal.

---

[1] The Court should not be misled by an argument that its jurisdiction is defeated because the Florida Supreme Court mentioned the Florida Constitution as providing support for its decision. See Fasenmyer v. State, at 457 So.2d 1365. Beside the fact that the decision is replete with decisions which construe federal double jeopardy law, the Court should be aware that the Florida Supreme Court has already held that Florida's double jeopardy equivalent is to be construed in the same manner as this Court construes the double jeopardy clause of the United States Constitution. See State v. Cantrell, 417 So.2d 260 (Fla. 1982). See also Michigan v. Long, ___ U.S. ___, 77 L.Ed.2d 1201, 1214 (1983), and Delaware v. Prouse, 440 U.S. 648, 653 (1979).

However, in Busic v. United States, 446 U.S. 398, 412, n. 19, this Court declined to reach the identical issue because it had not been argued first in the lower court.

It is worthy to note that this Court declined to grant certiorari in Busic, supra, after the Third Circuit had vacated on appeal several judgments and sentences because of double jeopardy problems. See United States v. Busic, 639 F.2d 940 (3d Cir.), cert. denied, 452 U.S. 918 (1981).

Although the Florida Supreme Court purported to distinguish Busic from Respondent's case, the distinction does not hold water. The Florida Supreme Court seemed to believe that because in Busic it had been the appellate court which had vacated the

judgments and sentences, for double jeopardy purposes, the case was different. The State of Florida submits that this is a distinction without a difference--for double jeopardy purposes, a reviewing court's "double jeopardy focus" should be "on the relief that is requested . . . ." United States v. DiFrancesco, 449 U.S. 117, 132 (1980).

The Florida Supreme Court also found that double jeopardy had been violated when the trial court changed one of Respondent's sentences from concurrent to consecutive. The lower court ignored the State's reliance upon North Carolina v. Pearce, 395 U.S. 711, 721 (1969), for the proposition that once a defendant successfully appeals his judgments and sentences, after a

retrial he can be constitutionally subjected to greater sentences because "the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." While, of course, such a defendant must be given credit for time already served, he has no constitutional or other right to any particular sentence, and he stands before the trial court as if no sentence had ever been imposed.

The Florida Supreme Court also found that the principle which supported United States v. Busic, supra, had not been accepted by other federal courts of appeals. See Fasenmyer v. State, 457 So.2d 1365, n. 4. However, the federal case law squarely supports Busic. See, e.g., United States v. Moore, 710 F.2d 270 (6th Cir.),

cert. denied, ___ U.S. ___, 104 S.Ct. 497 (1983), in which the Court upheld against a double jeopardy challenge the trial court's imposition of a 40 year sentence on one count after the defendant had successfully appealed on double jeopardy grounds his 25 and 15 year sentences on two counts. In accord, United States v. Jefferson, 714 F.2d 689, 707 (7th Cir. 1983), United States v. Hagler, 709 F.2d 578 (9th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 282 (1983); and McClain v. United States, 676 F.2d 915, 918 (2d Cir.), cert. denied, ___ U.S. ___, 103 S.Ct. 174 (1982).

The Florida Supreme Court's opinion also is in conflict with the Seventh Circuit's opinion in United

States v. Covelli, 738 F.2d 847, 862 (7th Cir. 1984). In that case, the Seventh Circuit reversed single convictions in a multi-count indictment of two defendants. Concerning re-sentencing, the court stated:

> The government argues, and we agree, that when convictions on some of multiple counts are reversed and others are affirmed we may vacate all of the sentences and remand for appropriate resentencing without offending the Double Jeopardy Clause. See United States v. DiFrancesco, 449 U.S. 117, 133-139 (1980); United States v. Jefferson, 714 F.2d 689, 707 (7th Cir. 1983); United States v. Raimondo, 721 F.2d 476, 478 (4th Cir. 1983).

Perhaps the best indication that the lower court incorrectly construed

the double jeopardy clause of the United States Constitution is the lower court's reliance upon its old opinion in Troupe v. Rowe, 283 So.2d 857 (Fla. 1973), which, in turn, had relied upon this Court's opinions in Ex Parte Lange, 18 Wall. 163, 21 L.Ed 872 (1874) and United States v. Benz, 282 U.S. 304 (1931). This Court made it abundantly clear in United States v. DiFrancesco, supra, that a sentence, once pronounced, was not to be accorded the constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. Id. at 449 U.S. 132. It is interesting to note that the Florida Supreme Court cited DiFrancesco in a footnote although the court concluded that its holding had

nothing to do with Respondent's case. See Fasenmyer v. State, 457 So.2d 1366, n. 4. This result is puzzling in light of the fact that DiFrancesco specifically disapproved of the dictum in both Lange and Benz upon which the Florida Supreme Court had relied in Troupe v. Rowe, supra.

In summary, at the conclusion of Respondent's third trial, he stood before the court as if he had never been sentenced at all. North Carolina v. Pearce, supra. In order to achieve his sentencing goal of a lengthy period of incarceration, the trial court vacated Respondent's sentences which had not been challenged on appeal and changed them to allow for a lengthier period of incarceration. Under United States v. Busic and United States v.

DiFrancesco, this does not violate double jeopardy, and the State of Florida respectfully requests that certiorari be granted to review this issue on its merits.

CONCLUSION

Certiorari should be granted to resolve the question left unanswered in Busic v. United States, supra. The lower court's opinion in this case is in conflict with the various federal courts of appeals cited in this brief, and it is also in conflict with the spirit of law on double jeopardy enunciated in United States v. DiFrancesco, supra.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

LAWRENCE A. KADEN
Assistant Attorney General

THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0600

COUNSEL FOR PETITIONER

APPENDIX

SUPREME COURT OF FLORIDA

No. 63,382

THOMAS RAPHAEL FASENMYER, Petitioner,

vs.

STATE OF FLORIDA, Respondent.

[September 13, 1984]

BOYD, C.J.

This cause is before the Court on petition for review of a decision of the District Court of Appeal, First District. The district court held that on remand after a successful appeal challenging only one of three criminal convictions, where the appellate relief

clearly attached to only one of the three convictions, the trial court could resentence the offender not only on the offense affected by the appellate court's ruling but also on the other offenses, including an offense the previously imposed sentence for which had been completely satisfied at the time of resentencing. Fasenmyer v. State, 425 So.2d 151 (Fla. 1st DCA 1983). Finding the jurisdictional ground of express and direct conflict with Troupe v. Rowe, 283 So.2d 857 (Fla. 1973) and Herring v. State, 411 So.2d 966 (Fla. 3d DCA 1982), we accept the case for review. Art. V, § 3(b)(3), Fla. Const. The issue is whether, when an appellate court reduces the severity of a criminal conviction because of lack of evidence and orders resentencing

accordingly, the trial court may change the sentences previously imposed on other convictions not affected by the appellate court judgment. Under the facts of this case as set out below, we hold that it may not.

In 1973, petitioner was convicted of three crimes and was sentenced for them as follows: (1) count one, breaking and entering with intent to commit a felony, while armed with a dangerous weapon, one hundred years; (2) count two, grand larceny, five years, consecutive to the sentence on count one; (3) count three, use of a firearm during the commission of a felony, fifteen years, consecutive to the sentences on counts one and two. On appeal, the judgment was affirmed without opinion. Fasenmyer v. State,

305 So.2d 99 (Fla. 1st DCA 1974), cert. denied, 315 So.2d 188 (Fla. 1975). However, petitioner sought habeas corpus relief in federal district court and received a new trial. He was again convicted on all three counts, but on appeal the convictions were reversed for a new trial due to procedural error by the trial court which was held to have been damaging to the fairness of the trial. Fasenmyer v. State, 383 So.2d 706 (Fla. 1st DCA), review denied, 389 So.2d 1109 (Fla. 1980).

Upon being tried a third time petitioner was again convicted of the same three offenses and was sentenced as follows: (1) on count one, breaking and entering while armed, fifty years with credit for seven years served; (2) on count two, grand larceny, five years,

to be served concurrently with the sentence on count one; (3) on count three, use of a firearm while committing a felony, no sentence was imposed, on the ground that the offense in count three "merged" with the offense in count one. Petitioner again appealed his convictions, and this time the appellate court held that there was insufficient evidence to convict him of breaking and entering. The court held that the highest offense petitioner could be convicted of on count one was entering without breaking. The court remanded for entry of judgment of conviction for that offense and for appropriate resentencing. The court specifically observed, "No error affects appellant's other convictions."

Fasenmyer v. State, 413 So.2d 33, 33 (Fla. 1st DCA 1981), review denied, 413 So.2d 877 (Fla. 1982).

On resentencing, the trial court was faced with an unusual situation. When imposing sentence previously the court had determined that count one, breaking and entering enhanced by the carrying of a firearm, and count three, based on the use or display of a firearm during the burglary, had "merged," and accordingly, had imposed no sentence on count three.[1] After remand from the district court of appeal, ordering reduction of the offense in count one to entering without breaking,

---

1. Neither the correctness of this characterization, nor its result as determined by the trial court, is an issue before us in this case.

it was determined that counts one and three had "unmerged" because there was no statutory provision for enhancement of the crime of entering without breaking by proof of the carrying of a firearm.[2]

---

2. Compare § 810.03, Fla. Stat. (1973) with § 810.01(1), Fla. Stat. (1973). The two statutes provided as follows:

§ 810.01:

> (1) Whoever breaks and enters a dwelling house, or any building or structure within the curtilage of a dwelling house though not forming a part thereof, with intent to commit a felony, or after having entered with such intent breaks such dwelling house or other building or structure aforesaid, if he be armed with a dangerous weapon, or have with him any nitroglycerine, dynamite, gunpowder, or other high explosive at the time of breaking and entering, or if he arm himself with a dangerous weapon, or take into his possession any such high explosive within such building, or if he make an assault upon any person lawfully therein, shall be guilty of a felony of the first

If the sentence on count one was to be reduced to the statutory maximum

---

degree, punishable by imprisonment in the state prison for life, or for such term of years as may be determined by the court.

(2) If the offender be not armed, nor arm himself with a dangerous weapon as aforesaid, nor have with him nor take into his possession any high explosive as aforesaid, nor make an assault upon any person lawfully in said building, he shall be guilty of a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

§ 810.03:

Whoever enters without breaking, any dwelling house, or any of the buildings or structures mentioned in §§ 810.01 and 810.02 or into any ship or vessel, with intent to commit a felony, shall be guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084. If the offender entered having with him, or having entered, takes into his possession, any high explosive mentioned in § 810.01, he shall be guilty of a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

punishment of five years and the sentence on count three (no sentence) was left undisturbed, then petitioner would escape punishment entirely for having used a firearm in the commission of the crime.

At the resentencing hearing, petitioner's counsel sought to alleviate this problem for the court by offering a stipulation or testimony that petitioner was carrying a loaded gun at the time of the unlawful entry he was convicted of on count one. Counsel's purpose was to allow the court to sentence petitioner for entering without breaking as a second-degree felony, carrying a possible penalty of fifteen years, rather than as a third-degree felony carrying a maximum penalty of five years. Use of the

applicable enhanced penalty provision required proof of possession of "nitroglycerine, dynamite, gunpowder, or other high explosive." See § 810.03, Fla. Stat. (1973) (referring to § 810.01, Fla. Stat. (1973)).[3] However, the court would not accept petitioner's argument that the powder in the bullets of his gun came within

---

3. Under section 810.03, Fla. Stat. (1973), entering without breaking was a third-degree felony, with a maximum sentence of five years imprisonment. § 775.082(4)(d), Fla. Stat. (1973). The offense could be enhanced to a second-degree felony by the possession of a "high explosive" as defined in section 810.01(1), but not by possession of a firearm. Breaking and entering under section 810.01 was a second-degree felony but could be enhanced to a first-degree felony by the possession of explosives or a firearm. Second-degree felonies were punishable by a maximum sentence of fifteen years, first-degree felonies by thirty years or life imprisonment. § 775.082(4)(b) and (c).

this statutory provision, and found that the most petitioner could be sentenced to on count one was five years.

Petitioner's objective in making this stipulation and argument was to avoid having the trial judge resentence him under count three. He argued that resentencing under count three would violate the rule of North Carolina v. Pearce, 395 U.S. 711 (1969). Pearce held that although there is no constitutional bar to imposing a more severe sentence on retrial after appeal, the Due Process Clause of the Fourteenth Amendment requires that vindictiveness against the defendant for having taken a successful appeal "must play no part in" resentencing. Valid reasons for a harsher sentence than that previously imposed must affirmatively appear in

the record and be based on "objective information concerning identifiable conduct." Id. at 725-26.

The trial court resentenced appellant as follows: (1) for count one, entering without breaking with intent to commit a felony, five years; (2) for count two, grand larceny, five years, consecutive to count one; (3) for count three, use of a firearm in the commission of a felony, fifteen years, consecutive to counts one and two. Petitioner was given credit for nearly nine years of time served.

On appeal petitioner challenged the resentencing on counts two and three. The district court affirmed and held that the trial court could change the sentences on offenses which were not challenged or disturbed on

appeal as to either conviction or sentence. Relying on United States v. Busic, 639 F.2d 940 (3d Cir. 1981), the district court reasoned that such a rule would allow the sentencing court to achieve its original sentencing plan based on the aggregate of the convictions. Fasenmyer v. State, 425 So.2d 151, 152 (Fla. 1st DCA 1983).

Petitioner argues that the district court was wrong to affirm the trial court's changing of the five-year sentence on count two from concurrent to consecutive. After his third trial petitioner was sentenced to five years for the offense of grand larceny, to be served concurrently with count one. By that time petitioner had already served seven years on count one and therefore he had fully satisfied the

concurrent sentence on count two. By changing the sentence from concurrent to consecutive in 1982, and not pursuant to any challenge by appellant to the previous sentence or the underlying conviction, the court nullified the service of those five years and violated the Double Jeopardy Clauses of the United States and Florida constitutions.

In Troupe v. Rowe, 283 So.2d 857 (Fla. 1973), this Court held that once a defendant has been sentenced, double jeopardy attaches and a court may not thereafter on its own motion increase the severity of the sentence. Such prohibition, clearly, should apply even more strongly when the offender has fully satisfied the sentence. It was so held in Ex Parte Lange, 85 U.S.

(18 Wall.) 163 (1893), where the defendant was sentenced to both a fine and imprisonment where the statute provided for either a fine or imprisonment. The Court held that when the offender had paid the fine, the sentence was fully satisfied and the court could not thereafter resentence him. Of course, the rule that a sentence cannot be changed after service has begun does not apply where the defendant successfully challenges his sentence or the conviction upon which it is based.

If petitioner had successfully appealed or collaterally attacked his conviction on count two, on remand the court would have been free to change the sentence from concurrent to consecutive so long as it stayed within

the confines of North Carolina v. Pearce. See Herring v. State, 411 So. 2d 966 (Fla. 3d DCA 1982); Brown v. State, 264 So.2d 28 (Fla. 1st DCA 1972). But we hold that where a conviction is not challenged and not disturbed by the appellate court, and has been fully satisfied by its terms by the time the trial court receives the case on remand, a sentence originally ordered to be served concurrently cannot be changed to consecutive service.

We also find merit in petitioner's argument as it pertains to his new sentence on count three. After petitioner's original conviction, he was sentenced to fifteen years on count three, to be served consecutively to counts one and two. On his second

conviction after retrial, the court gave petitioner no sentence on count three because it was deemed to have "merged" with count one. However, after the appellate court reduced count one to entering without breaking, an offense for which there is no provision for enhancement by the use of a firearm, the trial court no longer considered counts one and three merged for sentencing purposes. The court accordingly sentenced petitioner again to fifteen years consecutive to the sentences on counts one and two. While it might well be argued that the new sentence on count three does not come within the rule of Ex Parte Lange because petititioner never finished serving a sentence on count three, we nevertheless find that the court erred

in resentencing petitioner on count three.

In affirming the new sentences, the district court found support in United States v. Busic, 639 F.2d 940 (3d Cir. 1981). There it was held that because of an appellate court's reversal of one set of convictions among several, the trial "court's sentencing plan, based on the aggregate conviction . . . was thwarted. In such a case, we believe an appellate court, vacating one of those sentences, can vacate the other sentence even if its imposition is not specifically raised on appeal." Id. at 947 (footnote omitted). Thus Busic is somewhat different from the present case in that there the appellate court vacated the other sentence while here

the appellate court left the other convictions and sentences undisturbed. The propriety of an appellate court vacating an unchallenged sentence in order to allow plenary resentencing as in Busic is not before us because it is clear from the district court's opinion here that only the judgment and sentence on count one were affected by its judgment. 413 So.2d at 33.[4]

---

4. Thus, had the district court of appeal in 1981 vacated all three sentences rather than simply reversing on count one, Busic might provide support for the holding below. However, the Busic principle is still being debated in the federal courts and is far from having achieved universal acceptance. In Busic v. United States, 446 U.S. 398, 412 (1980), the question was left open. On remand, the Third Circuit rendered the decision discussed in text. However, the Fifth Circuit, in United States v. Henry, 709 F.2d 298 (5th Cir. 1983), held that after a collateral attack, a valid unchallenged sentence cannot be changed. The Supreme

We find Chandler v. United States, 468 F.2d 834 (5th Cir. 1972), much more closely applicable to this case. Like the present case, Chandler dealt with a trial court's modification, on its own motion, of the sentence on a conviction that had not been challenged.

Court's decision in United States v. DiFrancesco, 449 U.S. 117 (1980), upheld the constitutionality of the federal "dangerous special offender" statute, which gives the government the right to seek on appeal to increase the sentence of a dangerous defendant. This holding has created further confusion in light of the Fifth Circuit's view of the Third Circuit's interpretation of DiFrancesco, to the effect that the decision "abolished--even in the absence of a statute--the common law's double jeopardy ban against the imposition of an increased sentence after the defendant has begun to serve his original sentence." United States v. Henry, 709 F.2d at 309-10, (citing United States v. Busic, 639 F.2d 940). Whatever the outcome of that debate, it does not govern our disposition of this case.

There the government argued that because of an error in a companion sentence, the trial court properly changed the sentence on the unchallenged count in order to achieve the trial court's original intent. The Court of Appeals was not persuaded because divining the sentencing court's intent was too delicate an undertaking.

> To allow the trial court's action in this case to stand would place a rather formidable deterrent in the path of a convicted defendant who desires to apply for post-conviction relief on only one count of a multi-count conviction. By subjecting the defendant to the contingency of having a non-challenged sentence escalated to the statutory maximum, we would truly be inviting the defendant to play "Russian Roulette."

468 F.2d at 837.

Furthermore, the district court's reference, based on the Busic analysis,

to "aggregate" sentencing for multiple convictions based on "interdependent" offenses is inconsistent with the principle laid down by this Court in Dorfman v. State, 351 So.2d 954 (Fla. 1977). There we held that general sentences on convictions of multiple offenses were improper.

> The evil of a general sentence . . . inheres in the uncertainty that its inscrutability creates, for if the trial judge had committed a reversible error as to any one count for any reason, the entire sentence would have to be vacated. Then, on resentencing, a failure to reduce a new sentence for the affirmed conviction or convictions could raise complications comparable to those arising from the imposition of a more severe sentence when a defendant is convicted on retrial of the charges which underlay the reversed conviction.

Id. at 957 (footnote omitted). Each

separate offense must carry a discrete sentence. See § 775.021(4), Fla. Stat. (1981). We conclude that the concept of aggregate sentencing on interdependent offenses as it relates to a trial judge's desire to effect the original sentencing plan does not justify modification, on remand after appeal, of sentences on convictions not challenged on appeal or disturbed by the appellate court.

The decision of the district court of appeal is quashed and the new sentences improperly imposed on petitioner on counts two and three are vacated.

It is so ordered.

ADKINS, OVERTON and SHAW, JJ., Concur
ALDERMAN and McDONALD, JJ., Dissent

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

First District - Case No. AL-454

Quentin T. Till, Jacksonville, Florida,

for Petitioner

Jim Smith, Attorney General and Lawrence A. Xaden, Assistant Attorney General, Tallahassee, Florida,

for Respondent

MOTION FILED

JAN 31 1985

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

RECEIVED
FEB 9 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
JAN 31
Alexander L. Stevas, Clerk

CASE NO. 84-1178

STATE OF FLORIDA,

Petitioner

v.

THOMAS RAPHAEL FASENMYER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Thomas Raphael Fasenmyer, asks leave to file his Opposition to the petition for writ of certiorari filed by the Petitioner, State of Florida, without prepayment of costs and to proceed in forma pauperis. The Respondent has not sought leave to so proceed previously in any federal court, since this case has never been presented to any lower federal court. The Respondent has been represented by private counsel throughout the State court system, but is unable to retain counsel for these proceedings. The Respondent's affidavit in support of this motion is attached hereto.

Thomas Raphael Fasenmyer

Thomas Raphael Fasenmyer
P.O. Box 11035
Jacksonville, FL 32211

Respondent, pro se

A F F I D A V I T

I, THOMAS RAPHAEL FASENMYER, being first duly sworn according to law, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without bding required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of procee ding in this Court are true.

1. I am not presently employed.

   a. N/A

   b. 1973. $16,000.00 per year.

2. I have not received within the past twelve months any income from a business, prof ession or other form of self-employment, of in the form of rent payments, interest, dividends or other source.

   a. N/A

3. I do own case and a savings account.

a. Cash, $3.90. Bank account, $69.33

4. I do not own any real estate, stocks, bonds, notes or other valuable property. I do own an automobile.

   a. 1965 Chevrolet. Value: $100.00

FEB 9 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

5. I have no dependants at this time other than myself.

I understand that a false statement or answer to any q estions in this affidav it will subject me to penalties for perjury.

Thomas Raphael Fasermyer

Thomas Raphael Fasermyer
P.O. Box 11035
Jacksonville, FL 32211

Respondent, pro se

STATE OF FLORIDA

ss

COUNTY OF DUVAL

SUBSCRIBED AND SWORN TO before me this 6th day lf February, 1985.

Virginia Tracki

NOTARY

NOTARY PUBLIC, STATE OF FLORIDA
My commission expires Sept. 22, 1985

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

No. 84-1178

FILED
MAR 31 1985
ALEXANDER L. STEVAS
CLERK

RECEIVED
JAN 31 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

STATE OF FLORIDA,

Petitioner,

vs.

THOMAS RAPHAEL FASENMYER,

Respondent.

MOTION TO DENY PETITION FOR WRIT OF CERTIORARI

Comes now the Respondent, Thomas Raphael Fasenmyer, pro se, who moves the Court to deny the Petitioner's Petition for Writ of Certiorari, and in support would show:

PRELIMINARY STATEMENT

The Respondent has been represented by private counsel throughout all proceedings in the State of Florida, but this litigation has utterly impoverished him to the point that he cannot retain counsel to represent him before this Honorable Court. Thus, he has no choice but to respond to the Petitioner's petition for writ of certiorari, pro se.

STATEMENT OF THE CASE

The Respondent accepts and adopts the Statement of the Case submitted by the Petitioner.

REASONS WHY THE
THE PETITION SHOULD BE DENIED

The Petitioner has misstated the facts and/or the law repeatedly throughout his entire argument. By so doing, he has misrepresented to this Honorable Court that a conflict of decisions has arisen when, in fact, there is none. In response to his argument, the Respondent would show that the Florida Supreme Court did not make a distinction between which court vacated the judgments and sentences involved, the true fact is that NO court vacated the original judgments and sentences for Counts II and III prior to the trial court's imposition of SECOND judgments and sentences for these two counts. By imposing new judgments and sentences for these two counts without the original judgments and sentences being vacated, placed the Respondent under two judgments and two sentences for the same criminal episodes.

The Petitioner would have this Court believe that at the time of resentencing following the mandated resentencing in Count I, the slate had been wiped clean and relies on North Carolina v. Pearce, 395 U.S. 711, 721 (1969) to show that under these circumstances, it was entirely proper for the trial court to impose any sentence it chose so long as it did not offend due process. The fact is that in the instant case, the slate was not wiped clean, only Count I haveing been reversed by the Appellate Court, leaving Counts II and III intact. In such a case North Carolina v. Pearce is not relevant.

The Petitioner attempts to inject United States v. Busic, 639 F.2d 940 (3d Cir.), cert. denied, 452 U.S. 918 (1981) and supporting

authority of United States v. Moore, 710 F.2d 270 (6th Cir.), cert. denied, ___U.S.___, 104 S.Ct. 497 (1983), but these are misplaced. Neither is on point with the instant case. While it is true, the Florida Supreme Court did make reference to United States v. Busic, supra, in dictum, it was only in giving an analysis of similar cases, but the Court then went on to show the distinction with the instant case. In Moore, supra, the defendant did challenge his entire sentencing array, thus, when the case was returned to the trial court for resentencing, the slate, so far as sentencing, was wiped clean and the trial court was free to impose any sentence not offending due process.

The Petitioner's reliance on United States v. Covelli, 738 F.2d 847, 862 (7th Cir. 1984) suffers the same defect as his reliance on United States v. Busic, supra. In Covelli, as in Busic, the appellate court vacated all the sentences and remanded for appropriate resentencing de novo. And once again, this was NOT done in the instant case, the appellate court vacating the judgment and sentence for Count I, but approving and leaving intact the judgments and sentences for Counts II and III.

The Petitioner, represented by an Assistant Attorney General, still seemingly does not understand the difference between Ex Parte Lange, 18 Wall. 163, 21 L.Ed 872 (1874) and United States v. DiFrancesco, 449 U.S. 117 (1980). It does appear that many courts interpreted Lange to read that once service of a sentence had begun, it was constitutionally impermissible to change it, i.e. United States v. Benz, 282 U.S. 304 (1931), and several others, and DiFrancisco, supra, condemned that interpretation. But no court ever, DiFrancesco or any other, has condemned the correct holding of Ex Parte Lange, which was that once service of

of a sentencing alternative had been satisfied in full, the court was without power to impose a second sentencing alternative. Even the Busic decision which the Petitioner erroneously relies on, points out that distinction. And it is upon this rationale that the Florida Supreme Court vacated the resentence imposed on the Respondent for Count II.

To order a sentence to be served concurrently or consecutive to another sentence is clearly a sentencing alternative available to the trial court. Thus when, in the instant case, the sentence for Count II was originally ordered to be served concurrently with Count I, and to commence running June 24, 1973, that sentencing alternative was satisfied in full on June 24, 1978. Hence, it was patently unconstitutional for the trial court to impose the second sentencing alternative, consecutive to Count I in 1982, four years after the first sentencing alternative had been satisfied in full, and the Florida Supreme Court condemned it as such. Were the resentence have been allowed to stand, the Respondent would have to serve BOTH sentencing alternatives for the same criminal episode. The vacating of this resentence for Count II on double jedpardy grounds is not in conflict with any of the camouflaging authority authority relied on by the Petitioner.

The vacating of the resentence for Count III had nothing to do with constitutional law or double jeopardy and conspicuously absent from Petitioner's petition is any argument assigning as error the Florida Supreme Court's vacating the trial court's resentence as to Count III. Rather, the VACATING OF the resentence for Count III was a result of Florida Legislature mandating, in §775.041 (1981) Florida Statutes, that each separate offense carry a discrete sentence. Hence, the concept of "total aggregate sentence"

is not recognized in Florida when dealing with resentencing. Each count must receive a sentence unto itself, and if an error occurs in one sentence, it must be corrected without any reference to any other sentence.

Interestingly, the Petitioner, himself, relied on Herring v. State, 411 So.2d 966 (Fla. 3rd DCA 1982) in the court below but has abandoned this "support" in this Honorable Court. A reading of Herring shows why:

> "The cases which hold that an unattacked legal sentence cannot be disturbed when an illegal sentence is set aside and a new sentence imposed arises in a setting where a sentence on one count is legal and the sentence on another illegal. In that context, the legal sentence is considered untouchable because it is self-contained."
> —Herring, supra, at 969 (Emphasis added).

The Petitioner has abandoned Herring because Herring obviously defeats the novel argument he now attempts to urge upon this Honorable Court.

C O N C L U S I O N

Certiorari should not be granted because the decision of the Florida Supreme Court in the instant case is not in conflict with Busic v. United States, DiFrancesco v. United States, or any other decision cited by the Petitioner. The Supreme Court vacated the resentence on Count II because it violated the double jeopardy proscription of both the United States and Florida constitutions since it exposed the Respondent to the double punishments of both sentencing alternatives. The vacating of the resentence for Count III was not based on constitutional law, but rather because it violated state law announced by legislature in §775.041, Florida

Statutes (1981).

There is no conflict certiorari could resolve.

Respectfully submitted,

Thomas Raphael Fasenmyer
P.O. Box 11035
Jacksonville, FL 32211
Respondent, pro se

I HEREBY CERTIFY that I am utterly without funds to have this pleading printed and bound to comply with the rules of this Court.

Thomas Raphael Fasenmyer

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Mr. Lawrence A. Kaden, Asst. Atty. Gen., Suite 1501 The Capitol, Tallahassee, FL 32301 on this 27th day of January, 1985.

Thomas Raphael Fasenmyer